

**Statement of T.J. Halstead
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Before

**The Committee on the Judiciary
Subcommittee on Commercial and Administrative Law
House of Representatives**

November 14, 2006

**on
“The Administrative Law, Process, and Procedure Project”**

Mr. Chairman and Members of the Subcommittee:

My name is T.J. Halstead. I am a Legislative Attorney with the American Law Division of the Congressional Research Service at the Library of Congress, and I thank you for inviting me to testify today regarding the Committee’s ongoing and bipartisan “Administrative Law, Process and Procedure Project.”

My testimony today will address three issues that have been studied over the course of the project: public participation in the rulemaking process, agency adjudication, and judicial review of agency rulemaking, with a focus on how the various symposia and academic studies sponsored by the Committee have contributed to our understanding of the significant and complex issues that adhere in these contexts, as well as to illustrate the potential ability of a reconstituted Administrative Conference of the United States to further aid our appreciation of such issues. My testimony will additionally discuss the issue of whether a reconstituted ACUS would be duplicative of activities that are currently performed by the Office of Management and Budget.

Public Participation

Effective public participation in agency rulemaking is a fundamental principle of the Administrative Procedure Act, and the staff of your Committee has been particularly active in considering factors impacting such participation. Working with your staff, we have identified a wide range of issues that have arisen in this context, ranging from the effect of “non-rulemaking approaches,” such as the issuance of interpretive rules and policy

statements on public participation, to the effect of e-rulemaking initiatives.

On December 5, 2005, Professor Cary Coglianese of the University of Pennsylvania Law School convened a symposium on “E-Rulemaking in the 21st Century” that was sponsored by the Committee. This symposium brought together legislative and executive branch personnel, academic researchers, and non-governmental representatives for an in-depth discussion on e-rulemaking and the manner in which advances in information technology may impact the future of administrative rulemaking. In testimony presented before the Committee on July 26, 2006, Professor Coglianese commented on the status of empirical research on e-rulemaking, noting that empirical data that has been obtained to date does not appear to support the initial expectation that advances in this context would facilitate a significant increase in public participation. Nonetheless, technological improvements may ultimately provide substantial benefits in this regard. Professor Coglianese also noted that ancillary benefits of e-rulemaking, such as increased transparency, enhanced ability for executive or congressional oversight, administrative cost reduction, and greater ease of compliance provide additional justifications for continued efforts to improve agency utilization of electronic technology in rulemaking.

Another key issue in the public participation context has been whether efforts to include the public in the rulemaking process prior to the publication of a proposed rule should be expanded. Professor William West of the Bush School of Government and Public Services at Texas A&M University undertook an effort to study a specific aspect of this issue at the behest of the Committee, with the support of the Congressional Research Service.

Professor West formulated and conducted a project to analyze how agencies develop proposed rules, with a particular emphasis on how rulemaking initiatives are placed on agency regulatory agendas; how the rulemaking process is managed at inter and intra agency levels; and how public participation and transparency factor in the pre-notice and comment phase of rule formulation. Professor West has stated that the issue of public participation at this stage of agency rule formulation “may be especially relevant to the Congress as it considers possible amendments to the APA.” The study relied in large part on an electronic questionnaire sent to agency staff involved in the development of a large sample of individual rules and on interviews with high level agency personnel with extensive experience in the rulemaking process. One of the hopes for the study was that the questionnaire would generate data that would enable a systematic comparison of variations in agency practice regarding the scope, transparency, and inclusiveness of outside participation during this phase of rulemaking. However, a low response rate to the electronic questionnaire prevented such a comparison. Nonetheless, the interview and survey data did enable Professor West and his team to make some very interesting and important observations relating to outside participation in proposal development: that agency officials noted that the submission of information by public interest groups, industry representatives, other affected interests, and other agencies was “frequently indispensableable to intelligent decision making”; that the character of such participation is variable, based on a number of factors; and, finally, that such participation does not generally occur as the result of an inclusive agency approach, instead occurring by virtue of agency invitation or participant initiative.

While the West study has contributed significantly to congressional and academic understanding of the complex issues surrounding public participation in the pre-notice and comment rulemaking context, the low response rate to the survey could be viewed as

supporting the position that a reconstituted ACUS could serve an important role in facilitating research of this type. Professor West has related his view that the survey was hobbled by a general reluctance of agencies to share information, as illustrated by the fact that two agencies went so far as to explicitly order their staff not to respond to the survey. It is arguable that a similar study, if conducted by a reconstituted ACUS, would have greater success in generating the information necessary to enable the systematic comparisons envisioned by the West study by virtue of its non-partisan nature and organizational independence.

Agency Adjudication

Another matter of significant importance and interest to the project has been the issue of agency adjudication. In addition to rulemaking, it is a fundamental maxim of administrative law that agencies may control regulated activities and entities through adjudicatory processes. Regarding the basic issue of an agency's discretion to choose between rulemaking and adjudication, the Supreme Court established in *SEC v. Chenery Corporation* that "the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency." This dichotomy effectively allows agency adjudicators to exert policy-making authority through a quasi-judicial proceeding, as opposed to the quasi-legislative nature of the procedures that govern notice and comment rulemaking. This dynamic has given rise to the question of whether it is appropriate for agencies to establish binding policy through adjudication when such action could be effected through notice and comment rulemaking. ACUS, as a reconstituted entity, would be in a unique position to analyze the impact of agency determinations to regulate through adjudication and rulemaking, with the aim of formulating a recommendation as to whether the Administrative Procedure Act should be amended to explicitly address issues adhering to agency adjudication.

The mechanics of agency adjudication are also an issue that might be ripe for review by a reconstituted ACUS. To this end, CRS has identified a series of issues in this context that have been of interest to administrative law scholars and practitioners, ranging from the question of whether there is a need to reevaluate the Administrative Law Judge program, with a focus on the selection of ALJ's and the issue of whether ALJ's dealing with regulatory matters should be treated differently than those handling benefits cases. Additionally, a comprehensive study of the issue of whether the APA's adjudicatory provisions should be extended to all evidentiary hearings required by statute, as has been suggested by the American Bar Association, would appear to be particularly suitable for examination by ACUS.

Judicial Review

Judicial review of agency rulemaking has emerged as an issue of great significance and interest in the years since the demise of ACUS, and the study of this issue has factored prominently in efforts undertaken in aid of the Administrative Law, Process, and Procedure Project.

Under the Administrative Procedure Act, courts are authorized to invalidate rules that are deemed to be arbitrary or capricious. This standard of review, is not clearly defined, and the judiciary's interpretation of the meaning of this phrase has changed substantially over the past thirty years. Until the 1970's, arbitrary or capricious review

was extremely deferential, essentially requiring only that a regulation fall within the scope of legally delegated authority. However, the Supreme Court's 1971 decision in *Citizens to Protect Overton Park, Inc. v. Volpe* established a dynamic that has led to more stringent review of rules.

Overton Park addressed a challenge to the Secretary of Transportation's decision to approve the release of federal funds for the construction of a highway through a park, on the basis that the decision violated a prohibition on the use of federal highway funds for highway construction through public parks so long as another feasible and prudent route could be used. Applying the arbitrary or capricious standard to the Secretary's decision, the Court held that it was required to analyze whether the decision was based on "a consideration of the relevant factors and whether there had been a clear error in judgment...." The Court stated that while this inquiry must be "searching and careful," the standard of review was ultimately narrow. The Court then proceeded to remand the case so that the lower court could conduct a "thorough, probing, in-depth review of the administrative record underlying the Secretary's decision."

The language used by the Court in *Overton Park* is at once instructive yet ambiguous. The Court declares that judicial review under the arbitrary and capricious standard is to be "searching and careful," while simultaneously espousing a deferential approach to review of informal agency action by stating that the judiciary "is not empowered" to impose its judgment on an agency. It has been asserted that courts applying the precepts of *Overton Park* "tend to ignore all but the mandate to conduct a 'searching and careful' inquiry," slipping into a "a more active role than was intended for arbitrariness review." In turn, this increased level of scrutiny has been cited as facilitating the development of what has come to be referred to as the "hard look" doctrine of arbitrary and capricious review. This approach has been characterized as obliging a reviewing court "to examine carefully the administrative record and the agency's explanation, to determine whether the agency applied the correct analytical methodology, applied the right criteria, considered the relevant factors, chose from among the available range of regulatory options, relied upon appropriate policies, and pointed to adequate support in the record for material empirical conclusions."

The Supreme Court implicitly endorsed the hard look doctrine in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, while continuing to assert, as it had in *Overton Park*, that a reviewing court is not to substitute its judgment for that of the agency. This dichotomy between what, on the one hand, appears to be a very broad grant of discretion to a reviewing court and the much more restrictive notion that the courts are not to usurp agency judgment has been focused upon by both proponents and critics of the hard look standard. Some commentators have argued that the hard look doctrine is essential to allow for an appropriate level of judicial scrutiny of an agency's exercise of power, in that it ensures that agency decisions are not controlled by narrow private interests or an agency's own "idiosyncratic view of the public interest." Conversely, critics of hard look review maintain that it allows for so much judicial discretion "that a single unsympathetic or confused reviewing court can bring about a dramatic shift in focus or even the complete destruction of an entire regulatory program." It has been argued that the establishment of a more stringent review dynamic in *Overton Park*, coupled with the adoption of the hard look doctrine in *State Farm*, has caused the rulemaking process to become more rigid and burdensome upon agencies. In turn, this has led to the assertion that rulemaking has become "ossified," with agencies either undertaking resource and time intensive steps to ensure that a rule will withstand increased scrutiny, or circumventing the

traditional notice and comment rulemaking process by issuing policy statements and interpretive rules to effectuate compliance with a regulatory agenda.

Various studies have been conducted attempting to evaluate the number of challenges to agency rulemaking efforts and the effect of judicial review thereon. However, it has been stated that “administrative law scholars have failed generally to produce systematic empirical analysis of the effects of judicial review.”

In hopes of ameliorating this situation, the Committee recruited Professor Jody Freeman of the Harvard Law School to conduct a study aimed at providing just such an empirical analysis. With the aid of Curtis Copeland, one of my fellow CRS coordinators of this Project, Professor Freeman was able to obtain access to data on administrative agency appeals from the Administrative Office of the Courts (AOC) from 1995 to 2004. The data consists of 3,075 cases drawn from an initial database of over 10,000 cases involving administrative appeals from every circuit court over that time frame. The goal of the study is to ascertain what happens to agency rules upon appellate judicial review, with the aim of determining the rate at which rules are invalidated in whole or in part, and the reasons for that invalidation. Professor Freeman’s study is ongoing, but she discussed the methodology of the study and presented the preliminary findings of the study at a September 11, 2006 symposium on “Presidential, Congressional, and Judicial Control of Agency Rulemaking,” that was hosted by CRS as part of the Committee’s project. While the study is ultimately expected to yield significant and useful empirical data on the success of challenges to agency rules in the appellate courts, the limitations of this type of study might be seen as providing further evidence of the utility of a reconstituted ACUS. As Professor Freeman noted in her comments at the September 11, 2006 symposium, these types of studies do not give rise to a coherent and comprehensive empirical strategy that will foster optimal analysis of the administrative process for the long term. Rather, it could be argued that only an entity such as a reconstituted ACUS will have the ability to assemble a group of experts with the aim of formulating a cohesive methodology that will be supported by ongoing and systematic analysis.

The Differing Roles of ACUS and OIRA

Regarding the reauthorization and refunding of ACUS, I have worked closely with the staff of your Committee over the past two years in analyzing assertions that a reconstituted ACUS would be duplicative of functions that are already performed by Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB). Before addressing the merits of this argument, I think it is useful to provide an overview of the statutory structures and missions of these two entities.

Legislation creating a permanent Administrative Conference of the United States was enacted in 1964,¹ with funds first appropriated in 1968.² In 1995, the activities of ACUS ceased when funding for its activities was terminated. ACUS was reauthorized in the 108th Congress,³ but has yet to receive an appropriation. The statutory provisions governing ACUS were never repealed by Congress, and the reauthorization in the 108th Congress only slightly

¹ See 5 U.S.C. §§ 591-96.

² P.L. 90-392 (1968).

³ P.L. 108-401, 108th Cong. 2d Sess. (2004).

revised its original provisions, by authorizing appropriations and by making four additions to the “purposes” section of the Act.⁴

Pursuant to its statutory authorization, ACUS is tasked with (1) providing “suitable arrangements through which Federal agencies, assisted by outside experts, may cooperatively study mutual problems, exchange information, and develop recommendations for action by proper authorities to the end that private rights may be fully protected and regulatory activities and other federal responsibilities may be carried out expeditiously in the public interest”; (2) promoting “more effective public participation and efficiency in the rulemaking process”; (3) reducing “unnecessary litigation in the regulatory process”; (4) improving “the use of science in the regulatory process;” and (5) improving “the effectiveness of laws applicable to the regulatory process.”⁵

The reauthorization leaves intact ACUS’ original membership dynamic, which is structured, in effect, as a public/private partnership, in order to maximize “the joint participation of agency and outside experts in administrative procedure.”⁶ In the event of appropriation its membership will thus consist of a minimum of 75 and a maximum of 101 members, composed of a Chairman, council, and assembly. The Chairman would be appointed by the President, the council would be composed of the chair and ten other members, and the assembly, if comprised in accordance with prior practice, would consist of approximately 100 members, “consisting of representatives of federal agencies, boards, and commissions and private citizens, including lawyers, law professors, and others knowledgeable about administrative law and practice.”⁷

During the course of its original existence, ACUS was widely viewed as an effective, independent and nonpartisan entity. For instance, Sally Katzen, a former Administrator of OIRA during the Clinton administration, stated in 1994 that ACUS “has a long-standing tradition of private-sector membership that crosses party and philosophical lines.”⁸ Likewise, C. Boyden Gray, a former White House Counsel in the George H.W. Bush administration, testified before the House Judiciary Committee’s Subcommittee on Commercial and Administrative Law in support of the reauthorization of ACUS, stating: “Through the years, the Conference was a valuable resource providing information on the efficiency, adequacy and fairness of the administrative procedures used by administrative agencies in carrying out their programs. This was a continuing responsibility and a continuing need, a need that has not ceased to exist.”⁹

⁴ *Id.*

⁵ 5 U.S.C. §591(1)-(5).

⁶ Jeffrey Lubbers, “*If it Didn’t Exist, it Would Have to be Invented*” - *Reviving the Administrative Conference*, 30 Ariz. St. L.J. 147, 148 (1998).

⁷ Jeffrey Lubbers, *A Guide to Federal Agency Rulemaking*, Third Edition, American Bar Association, p. xvii (1998).

⁸ Toni M. Fine, *A Legislative Analysis of the Administrative Conference of the United States*, 30 Ariz. St. L.J. 19, 55 (1998).

⁹ C. Boyden Gray, Testimony Before the U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Commercial and Administrative Law, Hearing on the Reauthorization of the Administrative Conference of the United States, 108th Cong., 2d Sess. (June 24, 2004).

As further evidence of the respect of, and support for, ACUS, it is interesting to note that Supreme Court Justices Scalia and Breyer testified before the Subcommittee in support of the reauthorization of ACUS. Justice Scalia stated that ACUS was “a proved and effective means of opening up the process of government to needed improvement,” and Justice Breyer characterized ACUS as “a unique organization, carrying out work that is important and beneficial to the average American, at a low cost.”¹⁰ Examples of the accomplishments for which ACUS has been credited range from the simple and practical, such as the publication of time saving resource material, to analyses of complex issues of administrative process and the spurring of legislative reform in those areas.¹¹

The Office of Management and Budget traces its origin to the establishment of the original Bureau of the Budget within the Department of the Treasury by the Budget and Accounting Act of 1921.¹² The Bureau was transferred to the newly created Executive Office of the President by Reorganization Plan No. 1 of 1939,¹³ and was subsequently designated as the Office of Management and Budget by Reorganization Plan No. 2 of 1970.¹⁴ While OMB’s primary function centers on budget formulation and execution, it has many other major functions, including regulatory analysis and review. The Paperwork Reduction Act of 1980, later recodified as the Paperwork Reduction Act of 1995, established the Office of Information and Regulatory Affairs within OMB. In addition to its statutory responsibilities, OIRA exerts significant influence on the scope and substance of agency regulations through a presidentially mandated review and planning process. Shortly after the creation of OIRA in 1980, President Reagan issued Executive Order 12291, which imposed cost-benefit analysis requirements on rule formulation and established a centralized review procedure for all agency regulations. Responsibility for this program was delegated to OIRA.

In practical effect, E.O. 12291 gave OIRA a substantial degree of control over agency rulemaking, enabling OMB to exert considerable influence over agency efforts in this context from the earliest stages of the process. The impact of E.O. 12291 on agency regulatory activity was immediate and substantial, with OIRA reviewing over 2000 regulations per year and returning multiple rules to agencies for reconsideration. As a result of this rigorous review process, agencies became sensitized to the regulatory agenda of the Reagan Administration, largely resulting in the enactment of regulations that reflected the goals of the Administration.¹⁵ The issuance and implementation of the order generated controversy and criticism, with opponents asserting that the review process was distinctly anti-regulatory and constituted an unconstitutional transfer of authority to OIRA from the executive agencies. This review scheme was retained to similar effect and controversy in the George H.W. Bush Administration.

¹⁰ Jeffrey Lubbers, *Reviving the Administrative Conference of the United States: The Time Has Come*, 51 Dec. Fed. Law. 26 (2004).

¹¹ Fine, n. 8, *supra*, at 46. See also, Gary J. Edles, *The Continuing Need for an Administrative Conference*, 50 Admin. L. Rev. 101, 117 (1998).

¹² 42 Stat. 20 (1921).

¹³ 53 Stat. 1423 (1939).

¹⁴ 84 Stat. 2085 (1970).

¹⁵ See T.J. Halstead, *Presidential Review of Agency Rulemaking*, Congressional Research Service, Rep. No. RL32855 at 3 (2005).

President Clinton supplanted the Reagan era review scheme with Executive Order 12866, entitled “Regulatory Planning and Review.”¹⁶ The Clinton order implemented a more selective and transparent review process, while generally retaining the centralized review dynamic established by E.O. 12291. Coupled with the comparatively pro-regulatory stance of OMB during the Clinton era, this review scheme resulted in a decrease in the rates of OIRA review of rules, from an average of 2080 regulations per year in fiscal years 1982-93 to an average of 498 in fiscal year 1996.¹⁷ It is important to note that this decrease in the numbers of rules reviewed does not indicate a concession on the part of the Clinton Administration that there were limits on presidential control of the scope of OIRA review or on the agency rulemaking process specifically.¹⁸ Rather, it would appear that the Clinton Administration employed the OIRA review process and general assertions of administrative control over agencies in order to implement its regulatory agenda.¹⁹

The George W. Bush Administration has retained E.O. 12866, utilizing it to implement a review regime that subjects rules to more stringent review than was the case during the Clinton Administration. It has been asserted that the current Administration has returned to the review dynamic that prevailed under E.O. 12291, with OIRA describing itself as the “gatekeeper for new rulemakings.”²⁰ Under the current Administration, OIRA has increased the use of “return” letters to require agencies to reconsider rules, which, in turn, has led agencies to seek OIRA input “into earlier phases of regulatory development in order to prevent returns later in the rulemaking process.”²¹ This dynamic arguably buttresses executive control over agency rulemaking efforts by exerting influence over rulemaking activity at the earliest stages of rule formulation.²² Additionally, OIRA has instituted the practice of issuing “prompt letters” to appropriate agencies to encourage rulemaking on issues it feels are ripe for regulation.²³ OIRA has acknowledged that prompt letters “do not have the mandatory implication of a Presidential directive,” characterizing them instead as a device that “simply constitutes an OIRA request that an agency elevate a matter in priority.”²⁴ As with the use of return letters, the use of prompt letters has arguably enabled OIRA to exert a substantial degree of influence on an agency’s regulatory agenda.²⁵

While ACUS and OIRA could be viewed as operating within the same sphere to the extent that they are both concerned with regulatory matters, it would appear that there are substantial, concrete differences between their respective structures and missions that in turn give rise to a fundamental difference between the nature and manner of their respective assessments of agency performance in the administrative process.

¹⁶ *Id.* at 5.

¹⁷ *Id.* at 7.

¹⁸ *Id.* at 8.

¹⁹ *Id.* at 8.

²⁰ *Id.* at 10.

²¹ *Id.* at 10.

²² *Id.* at 10.

²³ *Id.* at 10.

²⁴ *Id.* at 11.

²⁵ *Id.* at 11.

Most importantly, ACUS is an independent entity, whereas OIRA is responsible for effectuating a given administration's regulatory agenda. As touched upon above, ACUS was widely regarded as an independent, objective entity that was tasked with the unique role of assessing all facets of administrative law and practice with the single goal of improving the regulatory process. As stated by one commentator, "[t]his level of bipartisanship contributed greatly to the ability of the Administrative Conference to reach consensus on issues for their merits rather than because of any particular ideology or party agenda; this in turn contributed to the credibility of the Conference's work and the willingness of academics and private attorneys to volunteer their time to the Administrative Conference."²⁶ Conversely, OIRA does not possess the indicia of independence or objectivity that characterized ACUS, nor does it claim such a character. As an arm of OMB, situated within the Executive Office of the President, OIRA is quintessentially executive in nature, with a predominant mission to advance the policy goals of the President. As such, while OIRA might be characterized as serving a coordinating function in the administrative context, it naturally follows that this function is exercised under the influence of the President.²⁷ Indeed, the activities of OIRA during the Reagan, Clinton, and George W. Bush Administrations, as touched upon above, would appear to establish that this coordinating function has been employed to further the regulatory agenda of those administrations.

The distinction between ACUS as an independent entity and OIRA as an executive agency may also be seen as having practical effects that give further credence to the ability of ACUS to serve in the consideration of agency specific issues. For instance, Loren A. Smith, currently serving as a Senior Judge on the United States Court of Federal Claims and a former Chairman of ACUS, has stated:

[T]he very fact of ACUS' smallness and its lack of investigative powers and budget sanctions, made agencies willing to come to ACUS and listen to ACUS. OMB or the General Accounting Office were threatening. The General Services Administration and the Office of Personnel Management were often perceived as the enemy. ACUS on the other hand, was seen as the kind counselor, one who gave useful, and generally palatable remedies. It thus had the confidence of most of the Executive branch and the Congress. And a place like this is not to be valued lightly.²⁸

Apart from concerns regarding independence and objectivity, it has been suggested that while the staff of OIRA possess a significant degree of expertise with regard to administrative issues, there are nonetheless fundamental structural issues that would inhibit OIRA's efficacy in this context, such as the "multitude of issues flowing through agencies daily, the severely limited resources of executive oversight, and the variety of control relationships that exist in the administrative system."²⁹ Justice Breyer echoed this sentiment

²⁶ Fine, n. 8, *supra*, at 55.

²⁷ See, e.g., Lubbers n. 6, *supra*, at 152.

²⁸ Loren A. Smith, *The Aging of Administrative Law: The Administrative Conference Reaches Early Retirement*, 30 Ariz. St. L.J. 175, 181 (1998).

²⁹ See Edles, n. 11, *supra*, at 135 (quoting Thomas O. Sargentich, *The Supreme Court's Administrative Law Jurisprudence*, 7 Admin. L.J. Am. U. 273, 280 (1993)). Professor Edles has further suggested that "[p]rocedure and process changes would rarely, if ever, rise to the level (continued...)

in his testimony discussing the mission of ACUS, stating “I have not found other institutions readily available to perform this task. Individual agencies, while trying to reform themselves, sometimes lack the ability to make cross-agency comparisons....The Office of Management and Budget does not normally concern itself with general procedural proposals.”³⁰

Also, the broad scope of ACUS’ mission, coupled with its independence and expertise is seen by many as making it the appropriate entity to analyze the efficacy of the functions of OMB itself. In his testimony before the Subcommittee, C. Boyden Gray identified OMB activities as being ripe for study by ACUS, suggesting “empirical research on the innovation of the OMB ‘prompt’ letter, matters relating to data quality and peer review issues,” as particularly suitable topics for inquiry.³¹

These issues of independence and objectivity, the widely recognized expertise and bipartisan nature of ACUS, and the broad scope of the work it conducted in all facets of the administrative process could thus be taken to belie the notion that the activities of a reconstituted ACUS would be duplicative of the functions of OMB or its Office of Information and Regulatory Affairs.

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Mr. Chairman, that concludes my prepared statement. I would be happy to answer any questions that you or other Members of the Subcommittee might have.

²⁹ (...continued)

sufficient to attract OIRA’s attention.” *See* Edles, n. 11, *supra*, at 135-36 n. 212.

³⁰ Stephen G. Breyer, Associate Justice, Supreme Court of the United States, Testimony Before the U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Commercial and Administrative Law, Hearing on the Reauthorization of the Administrative Conference of the United States, 108th Cong., 2d Sess., pp. 2-3 (May 20, 2004). *See also*, n. 9, *supra*.

³¹ *See* n. 9, *supra*.